

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Division of Aquatic Resources  
Honolulu, Hawaii 96813

July 22, 2009

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

**SUBJECT:** Resubmittal and Settlement Offer for Consideration –  
Enforcement Action against Makena Boat Partners for  
Breaking and Damaging Stony Coral in Makena Bay, Maui.

**SUMMARY:** This submittal requests the Board consider and approve the  
proposed settlement with Makena Boat Partners and its  
general partners Kai Kanani, Inc. and Maalaea Boat Sales and  
Charters, Inc. resolving the contention that Makena Boat  
Partners and its general partners violated Hawai'i Revised  
Statutes section 187A-5 and Hawai'i Administrative Rules  
section 13-95-70 by breaking and damaging stony coral  
within Makena Bay, Maui.

**DATES OF  
INCIDENT:** July 2007 through August 24, 2007

**AGAINST:** Makena Boat Partners and its general partners Kai Kanani,  
Inc. and Maalaea Boat Sales and Charters, Inc.  
5400 Makena Alanui Dr.  
Kihei, Maui 96753

**LOCATION OF  
DAMAGE:** Makena Bay, Maui

**I. Overview**

Makena Bay, Maui, is a popular ocean recreation area containing corals and other marine life. Kai Kanani, Inc. and Maalaea Boat Sales and Charters, Inc., through their general partnership, Makena Boat Partners (collectively "MBP"), conduct commercial snorkel tours in the area.

On July 22, 2007, Division of Aquatic Resources ("DAR") staff on Maui received a citizen complaint alleging that one of MBP's vessels, the *Kai Kanani*, was anchored on coral in Makena Bay.

An initial inspection by DAR staff on July 26, 2007 indicated that the *Kai Kanani's* anchor and chain had damaged 422.7 square meters of coral habitat. The area initially surveyed is

characterized by a flat, hard bottom with small, patchy coral colonies. Damage to stony coral is prohibited by Hawai'i Administrative Rules ("HAR") section 13-95-70(a), which states that "[i]t is unlawful for any person to take stony coral, or to break or damage any stony coral with a crowbar, chisel, hammer, or any other implement." On July 27, 2007, DAR notified Maui Division of Conservation and Resources Enforcement ("DOCARE") of the violation. On August 1, 2007, DOCARE issued MBP a citation and directed relocation of the *Kai Kanani*.<sup>1</sup> MBP disputes receiving any such directive on August 1, 2007. Hurricane Flossie hit the coast of Maui later that month and associated wave action increased the extent of damaged coral. DAR staff contacted MBP on August 21, 2007, and requested that the *Kai Kanani* be moved. On August 24, MBP relocated the *Kai Kanani*.

On August 29, 2007, DAR staff conducted a follow-up inspection of the *Kai Kanani* anchor site. Staff believes that the affected area had more than doubled during the time between August 1 and August 29, 2007. Staff estimated that 538 individual coral colonies were killed, damaged, or dislodged by the *Kai Kanani*'s anchor and chain. MBP disputes the estimate.

At its October 24, 2008 meeting, the Board of Land and Natural Resources ("the Board") accepted Staff's recommendation and found MBP to have violated HAR section 13-95-70(a). In response, MBP orally requested a contested case and then followed up with a written petition. The Board ordered that Staff's claims be reviewed at a contested case hearing. MBP then petitioned the U.S. District Court for exoneration from or limitation of any liability on account of the claim that its vessel damaged coral from July 2007 through August 2007. Currently, the contested case has been enjoined by the federal court, pending resolution of the federal case.

The State of Hawai'i and MBP (collectively "the parties") have agreed to a proposed Settlement and Release Agreement in the amount of \$130,000, among other terms and conditions. The agreement will resolve any and all issues regarding the anchoring of the *Kai Kanani* from July 2007 through August 2007, and the parties seek Board approval of its terms and conditions.

## **II. Previous Board Action**

On October 24, 2008, the Board approved Staff's enforcement action as submitted against MBP for breaking and damaging stony coral in Makena Bay, Maui in violation of HAR section 13-95-70(a). The Board imposed a fine of \$539,000 plus costs of \$3,950.49, for a total of \$542,950.49. After the Board announced its decision, MBP requested a contested case but disputed the authority of the Board to proceed administratively.

## **III. Contested Case and Federal Court Claim**

On November 3, 2008, MBP submitted a written petition for a contested case hearing. The petition was granted. On March 31, 2009, the parties held an initial conference call with Hearing Officer Lou Chang, and the parties agreed to a pre-hearing schedule. A hearing on the motions was scheduled for May 8, 2009. The contested case hearing was tentatively set for June 23-26, 2009 on Maui.

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<sup>1</sup> On October 5, 2007, MBP pled no-contest to the criminal citation and paid a fine of \$200 for damage to stony coral.

On April 13, 2009, MBP filed a claim in the U.S. District Court for the District of Hawai'i asking for exoneration or limitation of its liability. MBP also requested that the district court enjoin the administrative proceeding until the federal issues were resolved.

Over the objections of the State, on May 6, 2009, Senior Judge Samuel King enjoined the administrative proceedings. Accordingly, on May 7, 2009, Hearing Officer Chang ordered a stay of the contested case proceedings. The State filed various motions asking the federal court to dismiss the case or enter judgment in favor of the State. MBP vigorously opposes the motions, and the case presents difficult legal issues for both parties that have not yet been addressed by the federal court. The federal court could dismiss the petition (in which case the contested case could continue) or rule that the State is precluded from or limited in subjecting MBP to additional fines and costs on account of the damage allegedly caused by the *Kai Kanani*.

#### **IV. Proposed Settlement Offer**

The proposed Settlement and Release Agreement, drafted jointly by the State and MBP, is attached as Exhibit A. Agreement on the essential terms of the settlement was reached during a settlement conference on June 4, 2009, conducted before federal Magistrate Judge Barry Kurren. Dan Polhemus, DAR Administrator, was a direct participant in the negotiations and approved the settlement on behalf of the Department of Land and Natural Resources ("DLNR"). Russell Tsuji, DLNR First Deputy, also approved the settlement. Chairperson Laura Thielen did not participate in negotiations because the Board is acting in a quasi-judicial capacity in the contested case.

The parties agreed that MBP would make a payment of \$127,621.75 to the Commercial Fisheries Special Fund<sup>2</sup> plus administrative costs of \$2,378.25, for a total payment of \$130,000. The agreement states that payment of \$130,000 must be made within fourteen working days of the day on which the agreement is executed by the Chairperson of the Board and transmitted to MBP.

Staff believes this settlement value of \$130,000 represents a fair resolution of the pending dispute. The Board will note that the proposed settlement value is less than the \$542,950.49 in fines, fees, and costs originally imposed by the Board on October 24, 2008. At that initial Board meeting, DAR staff did not make a monetary value recommendation to the Board, instead, DAR staff noted the maximum fine that the Board might have levied and listed aggravating and mitigating factors for the Board to consider. The Board elected to impose the maximum fine allowable under law. The current proposed value of \$130,000 reflects Staff's detailed evaluation of the value of resources damaged. Staff believes that the proposed settlement amount properly balances the extent of harm caused to the stony corals, the ecological service value of the coral specimens, and the relative value of the overall area impacted.

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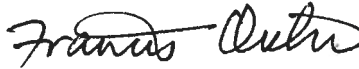
<sup>2</sup> The Commercial Fisheries Special Fund (Appropriation S-223) was established by Hawai'i Revised Statutes section 189-2.4.

Staff believes that this proposed settlement compares favorably with the recent resolution of the Kai Anela matter, settled in September 2008 for \$396,915, given the relative quality of the impacted resource. Staff is also in favor of the proposed settlement due to the uncertainties and risks of litigating this matter in the federal courts.

**V. Recommendation**

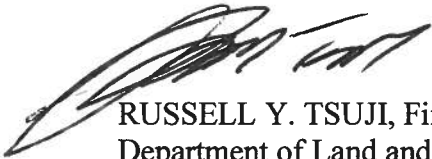
1. That the Board approve the proposed Settlement and Release Agreement by and between the State of Hawai'i and Makena Boat Partners, Kai Kanani, Inc., and Maalaea Boat Sales and Charters, Inc., as detailed in Exhibit A and authorize immediate execution of the document by the Chairperson or her designee and transmission to MBP.
2. That the Board authorize the Chairperson or her designee and the hearing officer to execute all documents necessary to dismiss the contested case after payment is received.

Respectfully submitted,



DAN POLHEMUS, Administrator  
Division of Aquatic Resources

APPROVED FOR SUBMITTAL:



RUSSELL Y. TSUJI, First Deputy  
Department of Land and Natural Resources

Attachment

## **SETTLEMENT AND RELEASE AGREEMENT**

### **I. PARTIES TO AGREEMENT**

This Settlement and Release Agreement ("Agreement") is made by and between the State of Hawai'i (including the Department of Land and Natural Resources), by and through the Board of Land and Natural Resources (collectively "the State"), and Makena Boat Partners, a Hawai'i general partnership, Kai Kanani, Inc., a Hawai'i corporation, and Maalaea Boat Sales and Charters, Inc., a Hawai'i corporation (collectively "MBP"). The State and MBP may sometimes collectively be referred to as the "Settling Parties."

This agreement when executed by MBP shall be an offer to settle which, upon acceptance by the Board on or before September 1, 2009, shall be a contract binding on the Settling Parties.

### **II. BACKGROUND AND RECITALS**

- A. MBP is the owner of *Kai Kanani*, official number 675 222 (the "Vessel").
- B. In July and August 2007, the Vessel was anchored in state territorial waters in Makena Bay off the coast of Maui.
- C. The State believes and has alleged that the anchoring of the Vessel damaged coral in violation of state rules and law. MBP disagrees and denies the allegations.
- D. MBP and the State desire to resolve any and all issues arising from the anchoring of the Vessel in July and August 2007 in accordance with the terms and conditions further described herein.

### **III. CLAIMS**

For the purposes of this Agreement, the term "Covered Claims" includes and means any and all claims, demands, causes of action, obligations, liabilities, fines, administrative cost, penalties, fees including attorney's fees, reimbursements, suspensions, and damages of any kind,

name, nature, or description caused by or claimed to be caused by the anchoring of the Vessel in Makena Bay from July 2007 through August 2007, which the State had, has, or may have against MBP, either at law (including administrative law) or in equity, whether known or unknown, suspected or unsuspected.

#### **IV. INTENT**

The Settling Parties desire to fully, finally and completely extinguish the Covered Claims. Upon the execution of this Agreement by the Settling Parties, the State shall take no action against MBP based on the Covered Claims, except to enforce any term or condition of this Agreement.

#### **V. CONSIDERATION AND RELEASES**

The consideration for this Agreement is the mutual covenants and representations contained herein.

A. **Settlement Payment:** In settlement of the Covered Claims, the parties agree that MBP shall pay to the commercial fisheries special fund established by Haw. Rev. Stat. § 189-2.4 (Cum. Supp. 2008) the sum of \$ 127,621.75 together with reimbursement of administrative costs in the amount of \$2,378.25 to DLNR. Payment of this total amount of \$130,000 will be made within fourteen working days of the day on which this Agreement, executed by the Chairperson of Board of Land and Natural Resources or other person authorized by the Board, is transmitted MBP. It is further agreed that transmission shall be complete when the executed Agreement is sent as an email attachment to Ronald Kim.

Payment shall be made by one check payable to the Department of Land and Natural Resources and received by the DLNR, in its Division of Aquatic Resources, at 1151 Punchbowl

Street, Room 130, Honolulu, HI 96813, on or before the date payment is due. Time is of the essence.

B. **Release of Covered Claims:** In consideration of the above, the State shall and by this document (upon and subject to receipt of the amount stated above) hereby does dismiss, waive, and release finally and forever any and all of the Covered Claims.

C. **Attorneys' Fees and Costs:** Except as otherwise stated, each party shall bear its own respective attorneys' fees and costs incurred herein.

## VI. **FURTHER AGREEMENTS, COVENANTS, AND REPRESENTATIONS**

A. **Successors and Assigns.** The Settling Parties agree that this Agreement is made on behalf of and inures to the benefit of MBP, its general partners, and their respective shareholders, officers, directors, partners, past or present employees, insurers, and successors in interest. The Settling Parties further agree that this Agreement is made on behalf of and inures to the benefit of the State and all its agencies, officials, employees, and any person or entity claiming by, through, or under the State.

B. **Bar.** This Agreement is an absolute bar to all of the Covered Claims released hereunder. The State agrees that it will not, at any time, make or bring any claim, demand, or suit against MBP concerning the Covered Claims released hereunder other than to enforce the terms and conditions hereof.

C. **No Admissions.** This Agreement is not an admission of any negligence, misconduct, breach of contract, bad faith, non-disclosure, interference, indemnity, contribution, reimbursement, liability, or fault of any kind whatsoever by MBP, but is being made to compromise and settle the Covered Claims which are disputed between the Settling Parties and

for the purpose of avoiding further controversy, administrative hearings, litigation, and trial expenses related thereto.

D. **Facts.** Each and every Settling Party understands and expressly accepts and assumes the risk of the inaccuracy of the facts with respect to which this Agreement is executed and agrees that this Agreement shall remain effective notwithstanding any such inaccuracies in such facts.

E. **Other actions.** Upon payment as described above, the Settling Parties shall take whatever action is needed, and prepare, sign and file documents as necessary, to dismiss with prejudice Civil No. 09-00166 SPK BMK now pending in the United States District Court for the District of Hawai'i and the administrative action pending as DLNR File No. DAR-MA-0801. Each party shall bear its own attorneys' fees and costs in those matters. The State shall be solely responsible for payment of the hearing officer.

F. **Headings.** The headings included in this Agreement are for convenience only and do not in any way limit, alter or affect the matters contained in this Agreement or the paragraphs that they encaption.

G. **Alteration of the Agreement.** This Agreement shall not be altered, amended, modified or otherwise changed in any respect, or particular whatsoever, except in a writing duly executed by all the Settling Parties. Each and every Settling Party acknowledges and agrees that it will make no claim, at any time or place, that this Agreement has been orally altered or modified in any respect whatsoever.

H. **Attorneys' Fees.** In any subsequent action to enforce the terms and/or provisions of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and costs incurred.



I. **Understanding.** The Settling Parties represent to each other that the effect of this Agreement has been fully and carefully explained to each of them by their respective counsel.

J. **Choice of Law and Venue.** This Agreement shall be governed by and construed in accordance with the law of the State of Hawai'i. Any action to enforce this Agreement shall be brought in the Circuit Court of the Second Circuit, State of Hawai'i.

K. **No Party Deemed Drafter.** The usual rule that any ambiguity in a document shall be construed against the party drafting the document shall not apply to this Agreement. The Settling Parties shall jointly be deemed to be the drafters of this Agreement.

L. **Entire Agreement.** This Agreement contains the entire agreement between the Settling Parties. The terms of this Agreement are contractual and not a mere recital.

M. **Execution in Counterparts.** This Agreement may be executed in two or more counterparts or by facsimile, and any set of counterparts or facsimiles which are collectively executed by all the parties shall be sufficient proof of this Agreement.


Dated: 6/18/2009

Makena Boat Partners

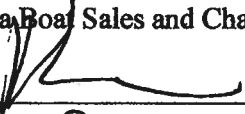
By Kai Kanani, Inc.,  
its general partner

by   
Its PRESIDENT

Kai Kanani, Inc.

by   
Its PRESIDENT

Maalaea Boat Sales and Charters, Inc.


by   
Its Pres. Kant

**Dated:** \_\_\_\_\_

State of Hawai'i

By \_\_\_\_\_  
As authorized by the Board of Land and  
Natural Resources on \_\_\_\_\_, 2009

Approved as to form:

  
\_\_\_\_\_  
Deputy Attorney General